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75-1433

IN THE

Supreme Court of the United States

..... Term, 197.....

CHARLES M. ALBRIGHT, Administrator of the Estate of CHARLES ALBRIGHT, Deceased,

Petitioner,

vs.

R. J. REYNOLDS TOBACCO COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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....Term, 19....

CHARLES M. ALBRIGHT, Administrator of the Estate of CHARLES ALBRIGHT, Deceased,

Petitioner,

vs.

R. J. REYNOLDS TOBACCO COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Your Petitioner prays that Your Honorable Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled civil action February 13, 1976.

Reference to Reports of Opinions Delivered in the Courts Below

The Opinion of Judge Aldisert of the United States Court of Appeals for the Third Circuit, filed February 13, 1976, and not yet reported, is reprinted in the Appendix hereto, P. A1, *infra.* The Dissenting Opinion of Judge Hunter of the United States Court of Appeals for the Third Circuit, filed February 13, 1976, and not yet reported, is reprinted in the Appendix hereto, P. A12, *infra.* The judgment entered by the United States Court of Appeals for the Third Circuit at Civil Action Nos. 75-1606, 76-1607, 75-2188 and 75-2189, is reprinted in

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the Appendix hereto, P. A21, *infra.* The Opinion of Judge Weber of the United States District Court for the Western District of Pennsylvania dated August 6, 1974, is reprinted in the Appendix hereto, P. A24, *infra.* The Opinion and Order of Judge Weber of the United States District Court for the Western District of Pennsylvania dated March 6, 1975, is reprinted in the Appendix hereto, P. A29, *infra.* The Memorandum Order and Opinion of Judge Weber of the United States District Court for the Western District of Pennsylvania entered March 25, 1976 is reprinted in the Appendix hereto, P. A39, *infra.*

Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1254(1). These claims originated in the State Court of Pennsylvania, specifically in the Court of Common Pleas of Allegheny County, Pennsylvania, and were removed to the United States District Court for the Western District of Pennsylvania by R. J. Reynolds Tobacco Company. It has been and remains the contention of Plaintiff-Petitioner that the United States District Court for the Western District of Pennsylvania lacked jurisdiction because that Court had already determined that the matter in controversy failed to exceed the sum or value of $10,000.00, exclusive of interest and costs. Judge Weber of the United States District Court for the Western District of Pennsylvania on three occasions denied Petitioner-Appellant's Motion to Remand and then entered Summary Judgment for R. J. Reynolds Tobacco Company on other grounds, none of which should have been considered by Judge Weber, and all of which should have been considered only by the State Court. Petitioner-Appellant filed an Appeal from the United States District Court for the Western District of Pennsylvania to the United States Court of Appeals for the Third Circuit pursuant

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to 28 U.S.C. § 1291. The United States Court of Appeals for the Third Circuit, Judges Aldisert, Hunter, and Garth, considered the Appeal without oral argument, following which Judges Aldisert and Garth upheld Judge Weber. Judge Hunter filed a dissenting Opinion suggesting that the reasoning adopted by Judges Aldisert and Garth might render meaningless 28 U.S.C. § 1447(c) and suggesting that their reasoning offers a plaintiff and a defendant of diverse citizenship a method for circumventing the restriction which Congress and the Courts have placed on the original diversity jurisdiction of the District Courts when and if both parties wish to litigate in Federal Court. Petitioner requested the United States Court of Appeals for the Third Circuit to grant a rehearing *in banc*, but this was denied by that Court.

Questions Presented

1. Should a United States District Court, for lack of jurisdictional amount, remand two civil actions to the State Court when the United States District Court acknowledged that these two civil actions filed in the State Court were for the identical causes of action originally asserted in another Complaint originally filed in the United States District Court, which the lower Court dismissed for lack of jurisdictional amount?

2. If a United States District Court dismisses a civil action for lack of jurisdictional amount and subsequently there is removed to the United States District Court civil actions filed in the State Court alleging the identical causes of action as were set forth in the original Complaint dismissed by the United States District Court, must the United States District Court remand to the State Court the civil actions removed from the State Court?

3. May a party be permitted to argue against the remanding of a civil action to the State Court when the party, in a

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prior proceeding in a United States District Court argued that the claim lacked the requisite jurisdictional amount for Federal diversity jurisdiction and when that party and the Court fully acknowledge that the claims filed in the State Court and the claim filed in the United States District Court are identical claims.

4. What is the purpose of 28 U.S.C. § 1447(c) if a United States District Judge who has determined that a claim initiated in the United States District Court lacked the requisite jurisdictional amount for Federal diversity jurisdiction is not required to remand identical civil actions removed to the United States District Court?

Statutory Provision Involved

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and is between—

(1) citizens of different States.

28 U.S.C. § 1447(c)

(c) If at any time before final judgment it appears that the case was removed improvidently, and without jurisdiction, the district court shall remand the case . . .

28 U.S.C. § 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in the State Court of which the District Courts of the United States have original jurisdiction, may be removed . . .

Statement of the Case

Charles Albright brought these suits during his lifetime for injuries and damages he sustained from consumption of cigarettes manufactured and sold by Defendant. His son, Administrator of his Estate, has been substituted as party Plaintiff. Before he died, Charles Albright filed two protective civil actions in State Court and he filed a Complaint in the United States District Court. He filed the protective actions in State Court to protect his right to claim against R. J. Reynolds Tobacco Company in the event the District Court should hold that his claim lacked the requisite jurisdictional amount for Federal diversity jurisdiction. Prior to trial of the claim filed in the United State District Court, R. J. Reynolds Tobacco Company moved for Summary Judgment, alleging among other things, that Charles Albright's claim lacked the requisite jurisdictional amount for Federal diversity jurisdiction. Gerald J. Weber, United States District Judge, granted the Defense Motion for Summary Judgment, 350 F. Supp. 341 (1972), and the United States Court of Appeals for the Third Circuit affirmed on the sole basis that the claim lacked the requisite jurisdictional amount requirement for Federal diversity jurisdiction, 485 F.2d 678 (1973). Your Honorable Court denied Certiorari, 416 U.S. 951 (1974).

Having exhausted all Appeals with reference to the Complaint initiated in the United States District Court for the Western District of Pennsylvania, your Petitioner, then caused R. J. Reynolds Tobacco Company to be served with process in the "protective" civil actions his father had filed in the State Court. Although R. J. Reynolds Tobacco Company, Judge Weber, and your Petitioner were in complete agreement, on the record, that the two civil actions pending in the State Court were identical to the civil action which had been initiated in the United States District Court and which Judge Weber dismissed for lack of requisite jurisdictional

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amount, R. J. Reynolds Tobacco Company nevertheless removed the two civil actions from the State Court to the United States District Court where they were assigned to Judge Weber. As is indicated by Judge Hunter in footnote 8 to His Honor's dissenting Opinion, the facts surrounding the removal of these two civil actions by R. J. Reynolds Tobacco Company appear to be within the type of "bad faith" rational recognized by Your Honorable Court in the St. Paul Mercury case at 303 U.S. 283, at pages 292-93. It is suggested that R. J. Reynolds Tobacco Company knew when it removed these civil actions from the State Court that the amount involved was too little to give the Federal District Court jurisdiction, for clearly R. J. Reynolds Tobacco Company had asserted on the record in the civil action initiated in the United States District Court that the claim did not meet the jurisdictional amount requirement for Federal diversity jurisdiction.

On three occasions Charles M. Albright requested Judge Weber to remand these civil actions to the State Court, and on all three occasions Judge Weber refused, even though His Honor, stated in His Honor's Memorandum Opinion filed March 25, 1975, (reprinted in the Appendix) that ". . . Furthermore, the Court from long acquaintance with this action and by reason of a prior determination in a preceding related case that the plaintiff could present no provable damages in support of his cause of action . . ."

The majority opinion of the United States Court of Appeals for the Third Circuit acknowledged that your Petitioner's position has certain visceral appeal and they indicated that application of its rule to the present facts seem anomalous, but they did not, as Judge Hunter in his dissenting Opinion suggested, vacate the Judgment appealed from and remand to the United States District Court with directions to remand to the Court of Common Pleas of Allegheny County, Pennsylvania.

Petitioner's Argument for Allowance of the Writ

This matter concerns the practical effect of three Federal Statutes, 28 U.S.C. § 1332, 28 U.S.C. § 1441, and 28 U.S.C. § 1447(c). It also concerns interpretation of the Opinion of Your Honorable Court in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938).

This matter concerns a United States District Judge who in considering the same claim reversed himself. The first time he considered whether this claim met the jurisdictional amount requirement of 28 U.S.C. § 1332, he ruled it did not. The United States Court of Appeals for the Third Circuit supported his position and affirmed that the claim did not meet the jurisdictional amount requirement of 28 U.S.C. § 1332. R. J. Reynolds Tobacco Company, of course, had asserted successfully to the District Court and to the United States Court of Appeals for the Third Circuit, on Appeal, that the claim did *not* meet the jurisdictional amount requirement of 28 U.S.C. § 1332.

Charles Albright, deceased father of your Petitioner, during his lifetime had protected himself in the event R. J. Reynolds Tobacco Company might successfully argue that his claim could not meet the jurisdictional amount requirement of 28 U.S.C. § 1332. Charles Albright, during his lifetime, had filed protective Writs in the State Court. Following Your Honorable Court's denial of the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, requesting Your Honorable Court to review dismissal of the claim for lack of jurisdictional amount, 416 U.S. 951 (1974), your Petitioner caused process in the State Court actions to be served upon R. J. Reynolds Tobacco Company. Petitioner was justified in believing that once his claim pending in the Federal District Court was dismissed for lack of jurisdictional amount, that the protective claims originally filed by his father in the State Court would remain in the State

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Court. But he was fooled! For R. J. Reynolds Tobacco Company then decided that the claim was worthy of Federal diversity jurisdiction, filed a Petition for Removal, posted the necessary bond, certified to the clerk of the District Court that the removed civil actions were related to the earlier civil action which had been dismissed by Judge Weber for lack of jurisdictional amount, and procedurally had these two civil actions which were initiated in the State Court assigned to Judge Weber for disposition. Judge Weber acknowledged in his Opinion dated August 6, 1974, which is reprinted in the Appendix, that

> ". . . It is not contested between the parties that this is the identical cause of action to the prior Federal Court action."

Judge Weber in his Opinion of March 6, 1975, which is reprinted in the Appendix, stated

> ". . . It must be noted that the dismissal of the prior action in this Court at Civil Action No. 65-1155 was done only after extensive discovery, production of evidence, pre-trial narratives and argument of counsel. It was nowhere evident on the face of the pleading that the plaintiff could not sustain a claim in excess of $10,000.00. It was only after a careful examination of the evidence to be produced in support of damages that the Court concluded that the minimum required jurisdictional amount could never be proven . . ."

In his Opinion of March 25, 1975, refusing Plaintiff's Motion for Leave to Appeal *In Forma Pauperis*, (which is also reprinted in the Appendix) Judge Weber acknowledged that the claim did not meet the jurisdictional amount requirement for he stated:

> ". . . Furthermore, the Court from long acquaintance with this action and by reason of a prior determination in a preceding related case that the plaintiff could present no provable damages in support of his cause of action . . ."

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Your Honorable Court should clearly understand that these three quotations are from three Opinions written by Judge Weber in these instant civil actions which were the civil actions removed from State Court. Each time your Petitioner requested Judge Weber to remand these civil actions to the State Court, Judge Weber refused to do so. Instead, Judge Weber considered other matters raised by R. J. Reynolds Tobacco Company in a Motion for Summary Judgment, and granted Summary Judgment in favor of R. J. Reynolds Tobacco Company. It is suggested that not only did R. J. Reynolds Tobacco Company reverse its position as to the "worth" of the claim asserted against it, but Judge Weber did the same thing. Once Judge Weber determined that the claim lacked jurisdictional amount, His Honor should have taken judicial knowledge that other identical claims must also, as of course, lack the required jurisdictional amount.

It is clear that when Judge Weber dismissed Civil Action No. 65-1155 *initiated* in the United States District Court, claimant was deprived of a trial by jury in that Court. Judge Weber had the right to deprive claimant of a trial by jury in the Federal Court when he found as a matter of law that the claim initiated in the Federal District Court did not meet the jurisdictional amount requirement of 28 U.S.C. § 1332. Judge Weber, however, also deprived claimant of a trial in the State Court, because Judge Weber refused to remand the claims to the State Court after R. J. Reynolds Tobacco Company removed them. This is not the situation where a claimant has lost his day in Court because the Federal Court had determined there was a lack of jurisdiction and the claimant had not protected himself by also filing suit in the State Court. Rather, this is a situation where the claimant did everything possible to protect himself by filing protective Writs in the State Court; here the Federal Court assumed jurisdiction of the claims filed in the State Court even though the same Federal judge had ruled that the Federal Court did not have jurisdiction over the identical claim.

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When Judge Weber in His Honor's Opinion of March 6, 1975 stated

> ". . . We do not see how plaintiff can now propose to stipulate to the same evidence in an effort to defeat Federal jurisdiction, without completely withdrawing all claims for damages . . ."

Judge Weber knew that plaintiff was not proposing to stipulate to anything. Rather, Judge Weber knew that the parties and the Court had agreed on the record that the claims were the same. Moreover, your Petitioner never attempted to *defeat* Federal jurisdiction; rather, Petitioner contended that jurisdiction *never existed* to begin with, as Judge Weber had so ruled. The evidence in all three civil actions (the one filed at Civil Action No. 65-1155 in the Court below and the two instituted in State Court) is the same. Judge Weber ruled that the evidence in Civil Action No. 65-1155 in the District Court did not meet the jurisdictional amount requirement for Federal diversity jurisdiction. Judge Weber then ruled that the identical evidence (in these two civil actions) afforded ". . . No grounds for remand for lack of jurisdiction . . ." as stated in His Honor's Opinion of March 6, 1975. This is beyond comprehension, and it is unreasonable and unjust.

We intend to briefly set forth below other important reasons why Your Honorable Court should grant this Petition (as Judge Hunter of the United States Court of Appeals for the Third Circuit so clearly reasoned in His Honor's dissenting Opinion):

A. The conclusion of the majority of the United States Court of Appeals for the Third Circuit is not required by either the holding or the language of *St. Paul Mercury Indemnity Co. vs. Red Cab Co.*, 303 U.S. 283, although they relied upon this Opinion of Your Honorable Court.

B. *Hartridge vs. Aetna Casualty & Surety Co.*, 415 F.2d 809 (1969) supports reversal of the lower Court.

C. The reasoning adopted by the majority of the United States Court of Appeals for the Third Circuit appears to render without meaning 28 U.S.C. § 1447(c) providing that if at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the District Court shall remand the case.

D. The reasoning of the majority of the United States of Appeals for the Third Circuit offers a plaintiff and a defendant of diverse citizenship a method for circumventing the restriction which Congress and the Courts have placed on the original diversity jurisdiction of the District Courts when and if both parties wish to litigate in Federal Court. Parties should not be permitted to secure by the "back door" of removal what they could not secure by the "front door" of original jurisdiction.

E. The United States District Judge held that he was not bound by his earlier Opinion dismissing the initial claim for lack of jurisdictional amount. He cited cases holding only that a jurisdictional dismissal does not bar a subsequent adjudication if the jurisdictional defect is cured. Since everyone is in agreement that the removed civil actions raise the identical claim held jurisdictionally insufficient, never can your Petitioner be found to have cured the defect which caused the earlier dismissal.

For all of these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Third Circuit
(Filed February 13, 1976)

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 75-1606, 75-1607, 75-2188 and 75-2189

CHARLES M. ALBRIGHT, Administrator of Estate of Charles Albright, Deceased,
Appellant in Nos. 75-1606 and 75-2188

v.

R. J. REYNOLDS TOBACCO COMPANY, a corporation.
(D.C. Civil Action No. 74-607)

CHARLES M. ALBRIGHT, Administrator of Estate of Charles Albright, Deceased,
Appellant in Nos. 75-1607 and 75-2189

v.

R. J. REYNOLDS TOBACCO COMPANY, a corporation.

(D.C. Civil Action No. 74-608)

Appeal From the United States District Court for the Western District of Pennsylvania

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Submitted Under Third Circuit Rule 12(6)
November 14, 1975

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Opinion of the United States Court of Appeals for the Third Circuit

Before: Aldisert, Hunter and Garth, *Circuit Judges.*

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Aldisert, *Circuit Judge.*

The principal question for decision is whether a diversity case, originated in state court and otherwise properly removed to federal court pursuant to 28 U.S.C. §1441[1] must be remanded because of a prior determination in a parallel case, originated in federal court, that an identical claim did not satisfy the $10,000 federal jurisdictional threshold of 28

[1]. § *1441. Actions removable generally.*

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought....

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U.S.C. §1332.[2] The district court denied plaintiff's motion to remand, exercised federal jurisdiction, and dismissed the case as barred by the state statute of limitations. We affirm.

The litigation arises out of the claim of Charles Albright[3] that R. J. Reynolds Tobacco Company is liable to him for cancer and related sicknesses allegedly caused by the company's products. The controversy has been in litigation for more than 10 years; claims have been asserted in state and federal courts; and the matter has been in this court before. *Albright v. R. J. Reynolds Tobacco Co.*, 350 F. Supp. 341 (W.D. Pa. 1972), *aff'd*, 485 F.2d 678 (3d Cir. 1973), *as modified*, 3d Cir., No. 72-2105, Nov. 23, 1973, *cert. denied*, 416 U.S. 951 (1974). Factual details are set forth in the district court opinion, *supra*, and need not be repeated here.

Plaintiff commenced three actions in 1965, two in the Pennsylvania state court and one in federal court. Because Pennsylvania practice did not permit joinder of tort and contract in one complaint, plaintiff filed two actions in the Court of Common Pleas of Allegheny County, Pennsylvania—one in trespass and one in assumpsit—by filing praecipes for writs of summons. Although plaintiff had the writs reissued once in

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[2]. § 1332. Diversity of citizenship; amount in controversy;

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties....

[3]. Charles Albright died in 1965, and his widow was substituted as plaintiff. Mrs. Albright died in 1973 and Mr. Albright's son, Charles M. Albright, was substituted as plaintiff. We shall refer simply to the plaintiff.

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1967, the writs were not served and plaintiff took no further action in the state court until 1974, seven years later. Shortly after initiating the state court action in 1965, plaintiff filed a complaint in the United States District Court for the Western District of Pennsylvania, alleging diversity of citizenship and an amount in controversy in excess of $10,000. He lost in federal court: the district court dismissed the complaint, *inter alia,* because the court was "convinced to a legal certainty that the evidentiary material submitted will not support a claim in excess of the jurisdictional minimum of $10,000." 350 F. Supp. at 352. We affirm on that ground, 485 F.2d 678 (3d Cir. 1973), *as modified,* 3d Cir., No. 72-2105, Nov. 23, 1973, and certiorari was denied on April 15, 1974, 416 U.S. 951. *See Nelson v. Keefer,* 451 F.2d 289 (3d Cir. 1971). Thereafter plaintiff sought to rejuvenate his action in the state court.

On May 15, 1974, plaintiff had the original writs of 1965 reissued; they were served on defendant on May 22. Praecipes to reissue the writs alleged that the amount in controversy exceeded $10,000. Based on this allegation, and diversity of citizenship, defendant removed to the United States District Court for the Western District of Pennsylvania on June 20, 1974. Four days later plaintiff filed complaints in trespass and assumpsit in the state court, each complaint demanding judgment in excess of $3,000 only. It is undisputed that these complaints state the identical claim previously considered by the federal court and adjudged insufficient as a matter of law to meet the $10,000 jurisdictional requirement. Plaintiff asserts that his evidence is also the same. Appellant's Brief at 8.

In the district court, the plaintiff moved to remand to the state court, arguing in essence that the district court was bound to be consistent: having previously determined as a

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matter of law that the identical claim did not satisfy the $10,000 jurisdictional requirement, the court could not now take jurisdiction of the case on removal. Furthermore, plaintiff argued, the complaints subsequently filed in the removed cases sought recovery in excess of $3,000 only. The defendant, for its part, opposed the motion to remand and moved for summary judgment on the grounds that the claim was barred by the statute of limitations, prior accord and satisfaction, and *res judicata.*

The district court denied plaintiff's motion to remand and dismissed the claim as barred by the statute of limitations without considering the other grounds of defendant's motion. Plaintiff has appealed from the final judgment pursuant to 28 U.S.C. § 1291, but challenges only the denial of his motion to remand. Brief for Appellant at 2. A denial of a motion to remand is properly reviewable on appeal from a final judgment. *American Fire & Casualty Co. v. Finn,* 341 U.S. 6 (1951); C. Wright, Federal Courts §41, at 147 (2d ed. 1970).

I.

We agree with the district court that *St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U.S. 283 (1938), properly controls the calculation of jurisdictional amount, and that the $10,000 requirement was satisfied. It may seem anomalous that a court can say a claim is not worth $10,000 and then say it is. However, the determination in one instance was made in a case *originated* in federal court; in the other instance the determination was made in an action *removed* to federal court. *St. Paul Mercury Indemnity* makes clear the very different standards applicable. In an action originated in federal court, the court must strike a difficult balance where unliquidated damages are involved: a plaintiff's frivolous

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claim cannot be decisive to establish the jurisdiction of the court, yet jurisdiction cannot be made to depend on the final outcome of the case. C. Wright, Federal Courts §33, at 111 (2d ed. 1970). *St. Paul Mercury Indemnity Co.* explains why the determination of the amount in controversy in a removed case is not so difficult:

> In a cause instituted in the federal court the plaintiff chooses his forum. He knows or should know whether his claim is within the statutory requirement as to amount. His good faith in choosing the federal forum is open to challenge not only by resort to the face of his complaint, but by the facts disclosed at trial, and if from either source it is clear that his claim never could have amounted to the sum necessary to give jurisdiction there is not injustice in dismissing the suit. . . . In such original actions it may also well be that plaintiff and defendant have colluded to confer jurisdiction by the method of the one claiming a fictitious amount and the other failing to deny the veracity of the averment of amount in controversy. Upon disclosure of that state of facts the court should dismiss.
>
> A different situation is presented in the case of a suit instituted in a state court and thence removed. There is a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court or that the parties have colluded to that end. For if such were the purpose suit would not have been instituted in the first instance in the state but in the federal court. It is highly unlikely that the parties would pursue this roundabout and troublesome method to get into the federal court by removal when by the same device the suit coult be instituted in that court. Moreover, the status of the

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> case as disclosed by the plaintiff's complaint is controlling in the case of removal, since the defendant must file his petition before the time for answer[4] or forever lose his right to remove. Of course, if, upon the face of the complaint, it is obvious that the suit cannot involve the necessary amount, removal will be futile and remand will follow. But the fact that it appears from the face of the complaint that the defendant has a valid defense, if asserted, to all or a portion of the claim, or the circumstance that the rulings of the district court after removal reduce the amount recoverable below the jurisdictional requirement, will not justify remand. And though, as here, the plaintiff after removal, by stipulation, by affidavit, or by amendment of his pleadings, reduces the claim below the requisite amount, this does not deprive the district court of jurisdiction.

303 U.S. at 290-92 (original footnotes omitted).

We find this analysis clear and controlling. Here, it was the status of the case as disclosed by plaintiff's state court praecipes that controlled; plaintiff did not file his complaints reducing the amount claimed until after removal. It is settled that "[g]enerally the right of removal is decided by the pleadings, viewed as of the time when the petition for removal is filed", C. Wright, Federal Courts § 38, at 134 (2d

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[4]. The time for filing the removal petition has been changed. Defendant now has 30 days from receipt of the initial pleading, or from service of the summons if the initial pleading is filed and not served. Alternatively, if "the case stated by the initial pleading is not removable", defendant has 30 days from receipt of the legal paper "from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b). *See generally* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Weschsler's the Federal Courts and the Federal System 1203-04 (2d ed. 1973).

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ed. 1970) (citing cases), and that "events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction once it has attached." *St. Paul Mercury Indemnity Co. v. Red Cab Co., supra,* 303 U.S. at 293; 1 W. Barron & A. Holtzoff, Federal Practice and Procedure § 101, at 464 (Wright ed. 1961) (citing cases). A fortiori, the filing of a pleading reducing the amount claimed could not oust the district court of jurisdiction.

It is precisely at this point where we and Judge Hunter part company. He does not agree with what we consider a clear statement in *St. Paul Mercury Indemnity Co.* Instead, characterizing it as ambiguous dictum (Dissenting Op. at 14, he expresses the view: "In sum, I believe that the law is that in a removal case, just as in an original case, jurisdiction is to be determined as of the time the action first reaches the district court, but that the court can and indeed must reassess jurisdiction as the case proceeds." (Dissenting Op. at 16.)

Considering the Supreme Court's stated rationale, 303 U.S. at 290-92, heretofore set forth at length, we find the rule of the controlling case neither ambiguous[5] nor dictum.[6]

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[5]. "If the language be clear it is conclusive. There can be no construction if there is nothing to construe." *United States v. Hartwell,* 73 U.S. (6 Wall.) 385, 396 (1868).

[6]. Although what is or is not dictum may, like beauty, be in the eye of the beholder, *see* Comment, *Dictum Revisited,* 4 Stan. L. Rev. 509 (1952), Rupert Cross offers a formulation that should not be too controversial: "[A]n *obiter dictum* is a 'statement of law in the opinion which could not logically be a major premise of the selected facts of the decision.' " R. Cross, Precedent in English Law 80 (2d ed. 1968).

The unusual aspect of this case is that the same judge[7] had previously determined as a matter of law that the identical claim did not satisfy the $10,000 requirement. Plaintiff argues that the district judge in considering the removed cases was obliged to take judicial notice of his prior determination of the companion federal case. While this argument has certain visceral appeal, it cannot withstand legal scrutiny. In unliquidated damage cases, determination of the amount in controversy is necessarily an imprecise calculation. It does not involve an objective fact, it involves a legal estimation, drawing on available evidence and with consideration for the procedural posture of the case. The standards for making the determination in an action originated in federal court are imprecise and difficult, *Nelson v. Keefer, supra.* But as *St. Paul Mercury Indemnity Co.* indicates, it is not unreasonable to apply different, simpler standards to a removed case: there is little danger of a frivolously high claim to invoke improperly federal jurisdiction, and there is a need for certainty to allow the defendant to decide promptly whether to remove. Different standards may compel different results.

Plaintiff asks, in effect, that we engraft onto the *St. Paul Mercury Indemnity Co.* rule an exception to cover the particular facts of this case. We decline to do so for several reasons. First, the logic of that case is compelling and, even if it were not, we are not free to disagree with it. Second, plaintiff has suggested no workable formulation of the exception he urges and no principle upon which such an exception could rest. Here the prior determination of insufficient amount in

[7]. Judge Weber heard the original federal court case. 350 F. Supp. 341 (W.D. Pa. 1972). Rule 35(E) of the Rules Court for the Western District of Pennsylvania provides that related cases shall be assigned to the same judge. Accordingly, Judge Weber also heard the instant case.

controversy was by the same judge. Would that be a necessary element of the exception we are asked to announce? Or would a prior decision of the same court suffice? Would the two claims have to be identical? Or would substantial similarity suffice? "[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 15 (1959). Plaintiff has exposed no principle lurking here upon which to rest the exception he urges, and we decline to announce a rule of law that would be sui generis in application.

II.

A third reason we decline to announce the exception urged is that we are not moved by the equities of plaintiff's case: the claim was time-barred under Pennsylvania law prior to removal. Plaintiff concedes as much and, in fact, has not appealed the district court's judgment that the claim is barred by the statute of limitations. The only real question is whether the claim will be dismissed as time-barred by the federal court or the state courts. Not only are we reluctant to generate the expenditure of additional state judicial resources by a remand under such circumstances, but we see no purpose in it. In a diversity case, a federal court is bound to apply the same statute of limitations that the coordinate state court would apply. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *see Day and Zimmerman, Inc. v. Challoner*,—U.S.—, 44 U.S.L.W. 3262 (Nov. 3, 1975) (per curiam).

Plaintiff's original praecipes were filed on August 24, 1965. Under Pennsylvania law, plaintiff was obliged to serve the

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writs of summons within 30 days, Pa. R. Civ. P. 1009(a), or seek reissuance of the writs within the period of the applicable statute of limitations. *Yefko v. Ochs,* 437 Pa. 233, 263 A.2d 416 (1970); *Zarlinsky v. Laudenslager,* 402 Pa. 290, 167 A.2d 317 (1961). Two years is the applicable limitations period in trespass, 12 P.S. §34; four years is the applicable period in assumpsit, 12A P.S. § 2-275. Plaintiff was obviously aware of the necessity for seeking reissuance of the writs because he did so on May 22, 1967. This kept his claim alive for a further period measured by the applicable statute of limitations. Hence, he had until May 22, 1969, to reissue the writ in trespass, and until May 22, 1971, to reissue the writ in assumpsit. He did not reissue either writ until May 15, 1974. Therefore, the claims were time-barred under Pennsylvania law, and would have been dismissed by a Pennsylvania court. A federal court in a removed diversity case is bound to do the same. *Witherow v. Firestone Tire & Rubber Co.,*— F.2d—(3d Cir., No. 75-1514,)

We conclude: (1) that the $10,000 requirement of 28 U.S.C. §1332 was satisfied as of the date of the petition for removal was filed—the district court, therefore, properly entertained jurisdiction and properly denied plaintiff's motion to remand; and (2) that, having thus taken cognizance of the case, the district court properly granted defendant's motion to dismiss the claim as barred by Pennsylvania's statute of limitations.

III.

It remains only to consider plaintiff's argument, apparently premised on due process, that the district court's decision deprives him of his right to trial in the state court. This argument is without merit. Characterizing the writs of sum-

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mons as "protective" writs (Appellant's Brief at 7) hardly suffices to convince us that plaintiff's action was not time-barred. The Pennsylvania statute of limitations was not tolled by the filing or during the pendency of the claim in federal court. *McSparren v. Weist*, 402 F.2d 867, 876 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969); *Overfield v. Pennroad Corp.*, 146 F.2d 889, 898 (3d Cir. 1944). Pennsylvania has a very simple procedure whereby a litigant in these circumstances can protect his state court action indefinitely: timely reissuance of timely issued writs. Plaintiff was obviously aware of this procedure when he procured reissuance in 1967, but, thereafter, he neglected the procedure and his claim lapsed. A statute of limitations inherently deprives a tardy litigant of any right to trial he might have had. On this point, we wholly agree with the district court's observation:

> The requirements of reasonable procedural rules and the substantive law of statutes of limitations which bar commencement of an action after a stated period of time do not infringe upon the requirement of due process. It would appear that the defendant has also certain rights, including the right, at some stage, to be free from further litigation.

The judgment of the district court denying the motion to remand and dismissing the claim as barred by the statute of limitations will be affirmed.

Hunter, *Circuit Judge, dissenting:*

I respectfully dissent from the majority's conclusion (part "I") that the district judge acted properly in refusing to

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remand plaintiff's action(s)[1] to the state court. In my view, the majority's result is not required by either the holding or the language of *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938), the case relied on.[2] The contrary result is supported by related principles governing our original diversity jurisdiction as well as by commonsense ideas of fairness and orderly process.

In *St. Paul Mercury*, the Court was asked to review[3] a decision that

> although, at the time of removal of a cause from a state court, the complaint disclosed an amount in controversy requisite to the federal court's jurisdiction, a subsequent amendment, reducing the sum claimed to substantially less than that amount, necessitates remand to the state court.

Id., 303 U.S. at 284. The Court's unanimous decision that such an amendment after removal could not oust the district court's jurisdiction establishes that the action of the appellant here in filing state court complaints alleging "in excess of $3000" could not affect jurisdiction if the district court had

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[1] Two state court actions were initially involved. See majority opinion at p. 3, *supra*. These were consolidated after removal to district court. Opinion and Order of Aug. 6, 1974, p. 122a.

[2] The second opinion of the district court dealing with the remand issue, dated March 6, 1975, relies also on Hatridge v. Aetna Casualty & Surety Co., 415 F.2d 809 (8th Cir. 1969), and American Universal Insurance Co. v. Kruse, 306 F.2d 661 (9th Cir. 1962). See p. 131a. Niether case is directly on point, although each opinion quotes the language from *St. Paul Mercury* which is discussed below. To the extent that it is relevant, I believe that *Hatridge*, in which the court affirmed a refusal to remand even though the complaint claimed *less* that $10,000, supports reversal here.

[3] It may be noted that the respondent conceded that the decision below was in error.

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previously acquired jurisdiction on the basis of the praecipes alleging in excess of $10,000. The correctness of the district court's treatment of that issue is therefore beyond question, and in fact appellant has not claimed otherwise in this court.

At the same time, it should be clear from the quotation above that the *St. Paul Mercury holding* did not cover the situation in which it is alleged that a remand is required on the ground that the *original* complaint (or, in this case, praecipe) failed to place in controversy an amount in excess of $10,000. Nevertheless, the majority interprets *language* in that opinion as establishing a rule that, in removal cases, the question of whether or not the amount actually in controversy meets the jurisdictional requirement is forever foreclosed if the original documents are not insufficient on their face. The ground stated is that "generally the right of removal is decided by the pleadings, viewed as of the time when the peition for removal is filed" (Majority opinion at p. 7, quoting from C. Wright, Federal Courts 134 (2d ed. 1970)), and "events occurring subsequent to removal which reduce the amount recoverable ... do not oust the district court's jurisdiction once it has attached." (Majority opinion at p. 7, quoting from *St. Paul Mercury*, 303 U.S. at 293.) Once again, I do not believe that the quoted language necessarily precludes a later conslusion by the district court, based on matters not appearing in the original documents, that jurisdiction did not in fact attach.

The right of removal may indeed, as a practical matter, be decided initially by the pleadings, since in many cases the only "record" at the time of the "decision" will be the plaintiff's complaint (or praecipe) and the defendant's petition for removal. This should not lead to the conclusion that the court cannot consider, *sua sponte* or on plaintiff's motion to

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remand, subsequent developments in the record. If it were so, 28 U.S.C. § 1447(c), providing that

> [i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case . . .,

would be rendered almost meaningless; it would provide only for those cases in which the district judge, reviewing his removal decision on the same record, *i.e.*, the pleadings and the petition for removal, concluded that he had erred. It is much more reasonable to conclude that the district judge is not only permitted but required to carry out the directive of § 1447(c) in the light of the developing record after removal.[4]

Appellant did not seek to rely (solely) on "events occurring subsequent to removal which reduce the amount recoverable." He sought only to have considered by the trial court matters which would shed light on the question of whether the action, as of the time of removal, actually comprised matters in controversy in excess of $10,000. In other words, appellant did not attempt to defeat or oust jurisdiction, but rather attempted to prove that jurisdiction had never existed.

There are strong policy considerations why any ambiguity in the dictum of *St. Paul Mercury* and the language of § 1447(c)

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[4]. It may be that this is the view of § 1447(c) that the district judge took. At the close of his first opinion (August 6, 1974) denying the motion to remand, he noted that "this disposition is not a final determination of the question of jurisdiction," quoting § 1447(c) (p. 121a). The district judge reaffirmed his refusal to remand in his opinion of March 6, 1975, in which he also granted summary judgment for defendant (p. 125-32a). It may therefore be that my disagreement with the district judge is much narrower than my disagreement with the majority opinion, in that the former goes only to the question of the *weight* to be given to the prior jurisdictional dismissal. See the transcripts of oral arguments on motions to remand, p. 34-82a.

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should be resolved in favor of an interpretation which mandates a continuing review of the current record to determine whether the action was properly removed. It is well established that in *original* diversity suits the district court is not bound as to the jurisdictional amount by the allegations of the complaint, but rather must dismiss at any point in the proceedings where it appears "to a legal certainty" that the claims were really for less than the jurisdictional amount. *Nelson v. Keefer*, 451 F.2d 289 (3d Cir. 1971) (affirming dismissal based on information adduced during pretrial proceedings).[5] The majority's analysis would thus create a significant and, in my view, unwarranted common law exception to the general rule that the removal jurisdiction of the district court is coextensive with its original jurisdiction. *E.g., Boston & Montana Consolidated Copper and Silver Mining Co. v. Montana Ore Purchasing Co.*, 188 U.S. 632, 640 (1903); 28 U.S.C. § 1441(a);[6] C. Wright, Federal Courts 130-31 (2d ed. 1970).

In addition, the majority's conclusion offers a plaintiff and a defendant (of diverse citizenship) who both wish to litigate in federal court a method for circumventing the restrictions which Congress and the courts have placed on the original

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[5] This, of course, is exactly the procedure we approved in our first hearing of this case, Albright v. R. J. Reynolds Tobacco Co., 485 F.2d 678 (3d Cir. 1973), *as modified*, 3d Cir., No. 72-2105, Nov. 23, 1973, *cert. denied*, 416 U.S. 951 (1974). The district judge based his dismissal on "extensive discovery, production of evidence, pre-trial narratives and argument of counsel." Opinion of March 6, 1975, p. 131a.

[6] 28 U.S.C. §1441: Actions Removable Generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed. . . .

The aspects in which removal jurisdiction is, by statute, made broader than original jurisdiction are collected in 1 J. Moore, Federal Practice 662 (2d ed.). None is applicable here.

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diversity jurisdiction of the district courts. Where such litigants recognize that a complaint can be drawn which, on its face, appears to place in controversy the jurisdictional amount, but which, after further proceedings, will be exposed as inadequate to invoke federal court jurisdiction, they will be permitted, under the majority's analysis, to secure by the "back door" of removal what they could not secure by the "front door" of original jurisdiction. I cannot believe that this is what either Congress or the *St. Paul Mercury* Court intended.

The majority admits that the application of its rule to the present facts "seem[s] anomalous" (Majority opinion at p.5), and that the appellant's position "has certain visceral appeal." (*Id.* at 10). A brief re-statement of the prior proceedings will demonstrate that both statements are fully justified. Plaintiff first sought a federal forum, filing an original diversity action. On motion of the defendant, the district judge, after taking evidence, granted summary judgment for defendant on the ground that plaintiff had secured prior satisfaction of his claim. *Albright v. R. J. Reynolds Tobacco Co.*, 350 F. Supp. 341, 344-49 (W.D. Pa. 1972). However, the opinion went on to hold, also on the motion of defendant (Brief of Appellee at p. 18), that it was clear "to legal certainty" that the claim did not place in controversy the jurisdictionally required amount. *Id.* at 349-52. This court affirmed, specifying that the affirmance was based on the jurisdictional ground. *Albright v. R. J. Reynolds Tobacco Co.*, 485 F.2d 678 (3d Cir. 1973), *as modified*, 3d Cir. No. 72-2105, Nov. 23, 1973, *cert. denied*, 416 U.S. 951 (1974). Appellant, bowing to the inevitable, then sought to pursue his claim in state court—a claim which appellee conceded was identical to that proferred in federal court. Opinion of

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August 6, 1974, p. 119a; Brief of Appellee at p. 3, 19. Nevertheless, appellee removed, seeking to invoke the federal court jurisdiction it had once shunned. The reason(s)[7] for appellant's resistance to this move are understandable: in federal court he would be before the same district judge who had already expressed the (unnecessary) opinion that appellant's cause was not meritorious. Nevertheless, the district court exercised jurisdiction over the case and disposed of it once and for all, albeit on a ground other than that stated in its earlier opinion. It would be difficult to explain to appellant why he should not feel that he has been subjected to a "catch 22." (See appellant's Brief at p. 8).

In sum, I believe that the law is that in a removal case, just as in an original case, jurisdiction is to be determined as of the time the action first reaches the district court, but that the court can indeed must reassess jurisdiction as the case proceeds. While the court is *not* to consider *events* (*e.g.*, change in parties' citizenship, *Morgan's Heirs v. Morgan*, 15 U.S. (2 Wheat) 290 (1817) (original jurisdiction)) occurring after filing or removal, it must consider any light that material subsequently submitted sheds on the jurisdictional "facts" that existed at the time of filing or removal, e.g., the "facts" establishing that the requisite amount was in controversy.

There is then no need to "engraft . . . an exception to cover the particular facts of this case." (Majority opinion at p. 8). Thr prior court determination to which appellant called attention in support of its motion to remand is just one of

[7] Appellant also claimed that the district judge was biased against his claim, and sought his disqualification. When the district judge declined to step aside, appellant sought a writ of mandamus, which was denied by this court on October 31, 1974 (No. 74-2088), and by the Supreme Court on January 27, 1975 (No. 74-723).

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various types of "evidence" which might be submitted to prove whether or not the jurisdictional amount was actually in controversy.* On the facts of this case, a reversal is required. Although the district judge held that he was not bound by his earlier opinion (or this court's affirmance thereof) (opinion of August 6, 1974, p. 120a), the cases he cites hold only that a jurisdictional dismissal does not bar a subsequent adjudication *if* the jurisdictional defect is cured. *E.g., Smith v. Pittsburgh Gage and Supply Co.*, 464 F.2d 870 (3d Cir. 1972). Since the parties have stipulated that the removed cause raised the identical claim previously held jurisdictionally insufficient, the appellant cannot be found to have cured the defect which caused the earlier dismissal. *Luker v. Nelson*, 341 F. Supp. 111, 114 (N.D. Ill. 1972), also cited by the district court, states "[t]he general rule" that "a determination of lack of jurisdiction will be deemed judicially conclusive in a subsequent suit on the same cause of action as to the precise issue of jurisdiction previously ruled upon. *See* American Surety Co. v. Baldwin, 287 U.S. 156, 166 . . . (1932)."

Without expressing any opinion as to whether the district court and the majority have properly decided the state-law statute of limitations question, I respectfully submit that the merits (or lack thereof) of appellant's claim cannot be used to

* If it *were* necessary to find an "exception" to cover the peculiar facts of this case, it would be unnecessary to look further than *St. Paul Mercury*. In footnote 23, immediately following the text cited by the majority, the Court cited two cases in which the federal courts remanded after it appeared *at trial* that the jurisdictional amount had not actually been in controversy, and concluded that the remands "may have been justified by the conviction that the defendant when it removed knew that the amount involved was too little to give jurisdiction." 303 U.S. at 292-93. Certainly the facts here are within that type of "bad faith" rationale.

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support the district court's refusal to remand. If, as I would hold, the district court was required to remand for lack of jurisdiction, neither that court nor this court has any power to decide on any aspect of the underlying cause of action. *Metcalf v. Watertown*, 128 U.S. 586, 587 (1888) (statute of limitations). While it may be that "[t]he only real question is whether this claim will be dismissed as time-barred by the federal court or the state courts" (majority opinion at p. 9, that evaluation would not make the question any less "real" or any less important. "[I]t is federal policy to strictly construe removal statutes and to limit the removal jurisdiction of the federal courts. The cases are legion." *Witherow v. Firestone Tire and Rubber Co.*, 3d Cir., No. 75-1514, filed—, p.—.

The judgment appealed from should be vacated and the case remanded to the district court with directions to remand to the Court of Common Pleas of Allegheny County, Pennsylvania.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Judgment Entered by the United States Court of Appeals for the Third Circuit, Civil Action Nos. 75-1606, 75-1607, 75-2188 and 75-2189

UNITED STATES COURT OF APPEALS

For the Third Circuit

Nos. 75-1606/75-1607 and
75-2188/75-2189

CHARLES M. ALBRIGHT, Administrator of
Estate of Charles Albright, Deceased,
Appellant,

vs.

R. J. REYNOLDS TOBACCO COMPANY,
a corporation.

(D.C. Civil Nos. 74-607 and 74-608)

On Appeals From The United States District Court
For The Western District Of Pennsylvania

Present: Aldisert, Hunter and Garth, *Circuit Judges.*

These causes came on to be heard on the records from the United States District Court for the Western District of Pennsylvania and were submitted under Third Circuit Rule 12(6).

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District

Judgment Entered by the United States Court of Appeals for the Third Circuit, Civil Action Nos. 75-1606, 75-1607, 75-2188 and 75-2189

Court filed March 6, 1975 and filed October 15, 1975, be, and the same are hereby affirmed. Costs taxed against the appellant.

ATTEST:
M. ELIZABETH FERGUSON,
Chief Deputy Clerk.

February 13, 1976

Certified as a true copy and issued in lieu
of a formal mandate on March 23, 1976.
Test: Thomas F. Quinn
Clerk, United States Court of Appeals
for the Third Circuit

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Petition to Rehearing

UNITED STATES COURT OF APPEALS

For The Third Circuit

No. 75-1606/7 & 75-2188/9

CHARLES M. ALBRIGHT, Administrator of Estate of Charles Albright, Deceased,
Appellant in Nos. 75-1606 and 75-2188,

v.

R. J. REYNOLDS TOBACCO COMPANY,
a corporation.

CHARLES M. ALBRIGHT, Administrator of Estate of Charles Albright, Deceased,
Appellant in Nos. 75-1607 and 75-2189,

v.

R. J. REYNOLDS TOBACCO COMPANY,
a corporation.

Present:

SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER WEIS and GARTH, *Circuit Judges*.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service,

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and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

Dated: Mar. 15 1976.

BY THE COURT,
ALDISERT,
Judge.

Opinion—Civil Action No. 74-608

IN THE UNITED STATES DISTRICT COURT
For The Western District of Pennsylvania

(Filed August 6, 1974.)

CHARLES M. ALBRIGHT, Administrator of the Estate of Charles Albright, Deceased,

Plaintiff.

vs.

R. J. REYNOLDS TOBACCO COMPANY, a corporation,

Defendant.

Civil Action No. 74-607
Civil Action No. 74-608

WEBER, *J.* August 6, 1974

The above-captioned suits were commenced in 1965 in the Court of Common Pleas of Allegheny County, Pennsylvania,

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by the filing of a praecipe in each case directing the Prothonotary to issue a writ of summons. Two separate suits were filed because the Pennsylvania procedural rules at that time did not permit the joinder of causes of action in trespass and assumpsit. Plaintiff made no attempt to have the writs served and the writs expired after thirty days without a service of process having been made. In 1967, plaintiff's attorneys filed a praecipe to have the writs re-issued, again without attempting to make service of process. Approximately seven years later plaintiff filed a praecipe to have the writs reissued and served upon the defendant. The praecipe to reissue the writ in each of these cases was filed in the Court of Common Pleas on May 15, 1974 and recited "wherein the amount in controversy exceeds Ten Thousand ($10,000) Dollars exclusive of interest and costs." Service was made on the defendant on May 27, 1974. On June 20, 1974, the defendant, a corporation incorporated under the laws of New Jersey and having its principal place of business in North Carolina removed the actions to this court.

The plaintiff has moved to remand these actions to the state court. Subsequent to the removal on June 24, 1974, plaintiff filed complaints in the Court of Common Pleas of Allegheny County, Pennsylvania, both of which contained a recital that "plaintiff demands judgment against defendant in a sum in excess of $3,000 plus costs of suit."

It is the plaintiff's contention that the cause of action asserted in the two removed state court complaints is the identical cause of action to that pleaded by the plaintiff in an action filed in this court at Civil Action No. 65-1155, and this court does not have jurisdiction to consider the removed action because of the dismissal of Civil Action No. 65-1155 for want of the necessary jurisdictional amount under 28 U.S.C. 1332. It is not contested between the parties that this is the

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identical cause of action to the prior federal court action. However, defendant argues that it has an absolute right of removal at this stage of the proceedings where the jurisdictional basis of the suit is apparent on the record. Defendant claims that the recitation of a claim in excess of $10,000 contained in the praecipe filed for the re-issuance of the writs which were issued and served in this case in May 1974 establishes the jurisdictional basis of this claim between citizens of different states.

The determination made by this court in Civil Action No. 65-1155 that the plaintiff failed to meet the minimum jurisdictional sum of $10,000 was based upon a motion of the defendant in that case for summary judgment specifically the defendant in that case, through the procedure of a motion for summary judgment, required the plaintiff to come forward with evidence showing that the claim presented could meet the jurisdictional requirements. Failing to present adequate evidence in support of the minimal jurisdictional requirement the plaintiff's complaint was dismissed for want of jurisdiction. The jurisdictional determination of this court was affirmed on appeal and an application for *certiorari* was denied. See *Albright v. R. J. Reynolds Tobacco Co.*, 350 F.Supp. 341 [W.D. Pa. 1972], aff'd 485 F.2d 678 [3rd Cir. 1973], *cert. den.* 40 L.ed. 2nd 301 [1974].

We do not believe that the judgment of dismissal for want of jurisdiction in Civil Action 65-1155 operates as a bar to a subsequent action.

> "A dismissal for lack of jurisdiction, however, will not preclude a second suit between the same parties unless the same jurisdictional issue is again decisive. Thus, if the jurisdictional defects that lead to the first dismissal either are cured or otherwise lose their controlling force, a second suit is no longer barred and the merits of the

suit may be reached. See, e.g. *Madden v. Perry*, 264 F. 2d 169 [7th Cir. 1959], cert. denied, 360 U.S. 931, 79 S. Ct. 1450, 3 L.ed 2d 1544 [1959]."

> *Luker v. Nelson*, 341 F. Supp. 111, 114 [N.D. Ill. 1972].

". . . jurisdictional dismissals do not bar further litigation of the cause of action when the subsequent complaint cures the jurisdictional defect. *Etten v. Lovell Manufacturing Company*, 225 F.2d 844, 846 [3rd Cir. 1955], cert. denied 350 U.S. 966, 76 S.Ct. 435, 100 L. Ed. 839 [1956]."

> *Smith v. Pittsburgh Gage and Supply Co.*, 464 F.2d 870, 874 [3rd Cir. 1972].

At this stage of the proceedings we have only before us the question of defendant's right of removal. Two state court actions were commenced between citizens of different states. The praecipe filed with the Prothonotary of the state court to secure the issuance of the writs of summons for each case in May 1974, which writs were actually served on the defendant, recited in each case that the amount in controversy exclusive of interest and costs exceeded $10,000. This was the status of the pleadings in the state court action when defendant removed the action to this court, and it is upon this record that we must determine the motion to remand for want of jurisdiction. The subsequent filing of complaints by the plaintiff after the removal had been effected in which a recital of a demand in excess of $3,000 does not oust the jurisdiction of this court. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U. S. 283 [1938]. The motion to remand will be denied.

It must be noted that this disposition is not a final determination of the question of jurisdiction. 28 U.S.C. 1447 (c) provides:

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"If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, . . . The State court may thereupon proceed with such case."

Order

AND NOW this 6th day of August, 1974, the motion of plaintiff to remand the above two cases to the State court from which they were removed is Denied.

It is further Ordered that the motion of defendant to consolidate the above two captioned actions is Granted, and the above two actions shall proceed on one record at Civil Action No. 74-607 without prejudice to the plaintiff to assert in Civil Action No. 74-607 any and all civil claims which plaintiff could have alleged in either of the above captioned actions. It is further Ordered that Civil Action No. 74-608 be and hereby is Dismissed and plaintiff's removal bond posted in Civil Action No. 74-608 is Ordered Refunded.

Defendant's motion to require plaintiff to file a complaint is Denied; complaints in the state court actions having been filed and served upon defendant's counsel subsequent to the petition for removal in this case.

It is further Ordered that plaintiff shall file his response to defendant's motion for Summary Judgment together with supporting brief on or before the 30th day of August, 1974. Upon receipt of said response and brief the court will set the motion for summary judgment down for argument.

GERALD J. WEBER,
United States District Judge.

cc: Mark B. Aronson, Esq.,
1502 Frick Building, Pittsburgh, Pa. 15219.

Rose, Schmidt and Dixon, Esqs.,
9th Floor Oliver Bldg., Pittsburgh, Pa. 15222.

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Opinion—Civil Actions Nos. 74-607 and 74-608

IN THE UNITED STATES DISTRICT COURT

For the Western District of Pennsylvania

(Filed March 6, 1975.)

CHARLES M. ALBRIGHT, Administrator of the Estate of Charles Albright, Deceased,

Plaintiff,

vs.

R. J. REYNOLDS TOBACCO COMPANY, a corporation,

Defendant.

Civil Action No. 74-607
Civil Action No. 74-608

WEBER, *J.* March 6, 1975

Defendant has moved for summary judgment in the above consolidated cases. The cases are removed diversity cases growing out of the same set of operative facts; one pleads a cause of action in trespass, the other in assumpsit, because the controlling state law at the time of filing did not permit the joinder of such causes of action. These actions were commenced in the Court of Common Pleas of Allegheny County, Pennsylvania, on August 24, 1965 by the filing of a praecipe directing the issue of a writ of summons. This commences an action at law in Pennsylvania and tolls the running of the applicable statute of limitations, Pa. Rule of Civil Procedure 1007, regardless of whether the Prothonotary issues the writ

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or the writ is given the Sheriff to serve. *Ehrhardt v. Costello,* 437 Pa. 557 [1970]; *Donahey v. Mattox,* 228 Pa. Super. 8 [1974]. No complaints were filed at that time and nothing was given the sheriff to serve.

The applicable statute of limitations on the causes of action covered by the praecipe in each case are two years for the trespass action, 12 P.S. 34, and four years for the assumpsit action under the Pennsylvania Uniform Commercial Code, 12A P.S. 2-275. The complaints, which were not filed in these cases for nine years, revealed a cause of action based on the plaintiff's discovery of lung cancer in December 1963.

However, the statute of limitations is not tolled indefinitely by the filing of a praecipe for a writ of summons:

> "The filing of a praecipe for a writ of summons is sufficient to toll the statute of limitations for an amount of time measured by the original statutory period. . .irrespective of whether the prothonotary issues the writ or the sheriff serves it. *Ehrhardt v. Costello,* 437 Pa. 556, 264 A 2d 620 [1970]. Furthermore the writ can be reissued at any time within two years from the date of its issuance, and thus toll the statute for a 2-year period from the date of its reissuance. Id."
>
> *Anderson v. Berhnard Realty Sales Co. Inc., et al.,* ..... Pa. Super. ..... Filed September 23, 1974.

The plaintiff was doubtless aware of this requirement when on May 22, 1967 a praecipe to reissue the writs was filed. Again there was no service of writs or complaints. Plaintiff does not contest this requirement. Plaintiff's brief states:

> "Plaintiff admits that under current Pennsylvania law, the writ must be reissued within the statutory period. *Zarlinsky v. Laudenslager,* 402 Pa. 290 [167 A.2d 317 [1961]].
>
> *Anderson v. Bernhard Realty Sales Co. Inc. supra.*

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Plaintiff on May 15, 1974 had the writs reissued and served on the defendant on May 27, 1974. Because the praecipes for the writs recited in each case the amount in controversy exceeds $10,000 exclusive of interest and costs, and because the parties were of diverse citizenship, the defendant caused the actions to be removed to the United States District Court under 28 U.S.C. 1441 on June 20, 1974. Subsequent to the removal, on June 24, 1974, plaintiff filed complaints in these actions in the Common Pleas Court containing recitals that "plaintiff demands judgment against defendant in a sum in excess of $3,000 plus costs of suit." A motion by plaintiff to remand was denied for reasons set forth in our opinion of August 6, 1974.

Plaintiff attempts to escape the effect of the bar of the statute of limitations by an argument that the applicable statutes are tolled by the pendency of a parallel action in the United States District Court. That action was begun by plaintiff in October 1965 and was pursued by plaintiff through a dismissal of the plaintiff's action, the affirmance of the District Court's action by the Court of Appeals and the denial of certiorari by the United States Supreme Court on April 15, 1974.

It is clear that Pennsylvania has no statutory or judicial rule which tolls the running of the statute of limitation during the pendency of an action in the courts of another jurisdiction. The plaintiff has cited none. The federal courts have recognized this in cases arising under Pennsylvania law. *Falsetti v. Local Union 2026, UMWA*, 335 F.2d 658, 662 [3rd Cir. 1966]; *McSparran v. Weist*, 402 F. 2d 867, 876 [3rd Cir. 1968]. The plaintiff, however, attempts to raise a due process issue by claiming that if the statute of limitations is enforced here he will be deprived of his right to have the merits of his claim determined by any court because the dismissal of his prior federal court action was on jurisdictional grounds.

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We can only remind plaintiff that he was free to proceed on the merits with his state court action at any time after filing the praecipe in August 1965. He was free to toll the bar of the statute of limitations as he did in 1967 by further reissuance of the writs, but this was not done after 1967 for seven years until 1974. The requirements of reasonable procedural rules and the substantive law of statutes of limitations which bar commencement of an action after a stated period of time do not infringe upon the requirement of due process. It would appear that the defendant has also certain rights, including the right, at some stage, to be free from further litigation.

Plaintiff attempts to argue that *Benn v. Linden Crane Co.*, 370 F. Supp. 1269 [E.D. Pa. 1973] illustrates that a new cause of action is created when a court entertains a subsequent suit embodying the same cause of action as one previously dismissed on jurisdictional grounds. But *Benn* was not a case dismissed for want of subject matter jurisdiction, but for lack of *in personam* jurisdiction over the defendant, which was later cured by amendment of the Pennsylvania long-arm statute and new service of the complaint. The court held that the action was properly commenced by the filing of the complaint which tolled the running of the statute and only the question of service of process was involved.

We do not find the Pennsylvania lower court cases cited by plaintiff to be controlling authority, not because they are not decisions of the highest appellate court of the state, but because they are not even persuasive, being based on factual peculiarities and requirements of state procedural law. They in no way establish the existence of any "tolling" provision in Pennsylvania law arising from the pendency of the same lawsuit in the court of another jurisdiction.

We conclude that the actions commenced by the plaintiff in the state court were barred by Pennsylvania law by matters

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occurring long before the cases were removed to federal court, *Zarlinsky v. Laudenslager*, 402 Pa. 290 [1961].

Plaintiff's previous motion to remand was denied by our opinion of August 6, 1974 for the reasons stated therein. At the date of argument on the present motion plaintiff's counsel moved orally to remand on the basis that he would offer all the evidentiary material previously considered by this court in the prior action at Civil Action No. 65-1155 upon which this court determined that the required jurisdictional minimum amount was not present. [350 F.Supp. 341; aff'd. 485 F. 2d 678, cert. den. 40 L. Ed. 2d 301].

We do not believe that plaintiff can, by his own action subsequent to the removal, take any action to defeat the removal which was made on the basis of the pleadings at the time of removal. Plaintiff attempted, after the removal here, to reduce the demand by filing a complaint in the state court in which he made a demand for damages in excess of $3,000. We rejected that grounds in our opinion of August 6, 1974.

The fountainhead of all modern law on the subject is *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 [1938]. The opinion has been quoted in a multitude of subsequent cases, abstracted, summarized, and subjected to exegesis. See 1A Moore's Federal Practice (2nd ed.) 0.157 [6].

The most specific statement of the *St. Paul Mercury Indemnity Co.* opinion is:

> "Thus events occurring subsequent to removal which reduce the amount recoverable, whether beyond plaintiff's control or the result of his volition, do not oust the district court's jurisdiction once it has attached."
>
> (p. 293).

The *St. Paul Mercury Indemnity Co.* case illustrates the difference between the treatment of the jurisdiction question of

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cases originally brought in federal court and those removed. In those cases originally brought in federal court the plaintiff chooses his forum, he knows or should know the value of his claim, his good faith is subject to challenge to the face of his pleadings and to the evidence produced at trial.

> "A different situation is presented in the case of a suit instituted in a state court and thence removed. There is a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court or that the parties have colluded to that end. For if such were the purpose suit would not have been instituted in the first instance in the state but in the federal court. It is highly unlikely that the parties would pursue this roundabout and troublesome method to get into the federal court by removal when by the same device the suit could be instituted in that court. Moreover, the status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal, since the defendant must file his petition before the time for answer or forever lost his right to remove. Of course, if, upon the face of the complaint, it is obvious that the suit cannot involve the necessary amount, removal will be futile and remand will follow. But, the fact that it appears from the face of the complaint that the defendant has a valid defense, if asserted, to all or a portion of the claim, or the circumstance that the rulings of the district court after removal reduce the amount recoverable below the jurisdictional requirement, will not justify remand. And though, as here, the plaintiff after removal, by stipulation, by affidavit, or by amendment of his pleadings reduces the claim before the requisite amount, this does not deprive the district court of jurisdiction."
>
> (pp. 290, 291-292, footnotes omitted).

In the present case the defendant, a New Jersey corporation, was served with summons in two cases brought by a Pennsylvania administrator in which the praecipe for each of the writs recited a claim in excess of $10,000. The jurisdiction basis for removal is apparent:

> "It is the situation at the time of removal which is determinative . . . A subsequent change, such as the plaintiff's post-removal voluntary reduction of his claim to less than the jurisdictional amount, does not defeat federal jurisdiction acquired through removal."
>
> *Hartridge v. Aetna Cas. & Surety Co.* 415 F.2d 809, 814 [8th Cir. 1969].

See also: *American Universal Ins. Co. v. Kruse,* 306 F. 2d 661,663 [9th Cir. 1962].

It must be noted that the dismissal of the prior action in this court at Civil Action No. 65-1155 was done only after extensive discovery, production of evidence, pretrial narratives and argument of counsel. It was nowhere evident on the face of the pleading that the plaintiff could not sustain a claim in excess of $10,000. It was only after a careful examination of the evidence to be produced in support of damages that the court concluded that the minimum required jurisdictional amount could never be proven. Several pages of the opinion at 350 F.Supp. 341 are devoted to an analysis of the evidence to be produced in support of the damages claimed and their relation to the injury claimed. It was after this procedure, similar to a full trial on the issue, that the court concluded that the evidence would not support a claim in excess of the jurisdictional minimum.

We do not see how plaintiff can now propose to stipulate to the same evidence in an effort to defeat federal jurisdiction, without completely withdrawing all claims for damages.

Under the circumstances we cannot agree to any motion for remand. The action was properly removed and we find no grounds to remand for lack of jurisdiction. We must therefore determine the action as a matter of substantive law.

The two above-captioned actions will be dismissed as barred by the applicable Pennsylvania statutes of limitations because of the failure of plaintiff to reissue the appropriate writs within the applicable periods of statutes of limitation after May of 1967.

ORDER

AND NOW, this 6th day of March, 1975, upon consideration of Defendant's Motions for Summary Judgment, and briefs and arguments thereon, and in accordance with the foregoing Opinion, it is

ORDERED that Defendant's Motions be GRANTED, and JUDGMENT is hereby ENTERED for Defendant and against Plaintiff in the above-numbered actions.

GERALD J. WEBER,
United States District Judge.

cc.:

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Plaintiff's Motion to Remand to State Court—
Civil Action No. 74-607

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania
(Filed March 5, 1975.)

CHARLES M. ALBRIGHT, Administrator of the Estate of Charles Albright, Deceased,

Plaintiff,

vs.

R. J. REYNOLDS TOBACCO COMPANY, a corporation,

Defendant.

Civil Action No. 74-607.
Civil Action No. 74-608.

WEBER, *J.*

AND NOW comes Plaintiff, by his attorneys of record, and moves Your Honorable Court for an Order remanding these Civil Actions to the Court of Common Pleas of Allegheny County, Pennsylvania for the following reasons, all of which appear of record in Civil Action numbers 65-1155, 74-607 or 74-608:

1. Plaintiff hereby incorporates into this motion the entire proceedings including but not limited to Plaintiff's Pre-Trial Statements filed in this Court at No. 65-1155.

2. Plaintiff hereby incorporates by reference into this motion the Order of Court entered at Civil Action No. 65-1155 dismissing that Civil Action for lack of jurisdictional amount.

Plaintiff's Motion to Remand to State Court—
Civil Action No. 76-607

3. The pleadings and briefs filed on behalf of the parties to these Civil Actions at Nos. 74-607 and 74-608 indicate that these Civil Actions are the identical Civil Actions to that at No. 65-1155, which was dismissed for lack of jurisdictional amount.

4. Inasmuch as the claim and causes of action asserted in the Civil Actions are identical to those at No. 65-1155, dismissed by this Court for lack of jurisdictional amount, these Civil Actions should be remanded to the Court of Common Pleas of Allegheny County, Pennsylvania for the same reason.

WHEREFORE, this Motion.

Respectfully submitted,

BEHREND AND ARONSON,
By: (Illegible),
Mar 5, 1975.

Mar 11, 1975. This Motion is denied in accordance with opinion and order filed Mar 6, 1975.

GERALD J. WEBER.

Memorandum Order on Motion for Leave to Appeal in Forma Pauperis—Civil Actions Nos. 74-607 and 74-608

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania
(Filed March 26, 1975.)

CHARLES M. ALBRIGHT, Administrator of the Estate of CHARLES ALBRIGHT, Deceased,

Plaintiff,

vs.

R. J. REYNOLDS TOBACCO COMPANY, a corporation,

Defendant.

Civil Action No. 74-607.
Civil Action No. 74-608.

The plaintiff in the above two related civil actions has moved this court for leave to proceed on appeal *in forma pauperis* under Fed. R. of App. P. 24(a). This court in good conscience cannot grant such leave for the following reasons:

This court has had extensive experience with this litigation and related litigation which preceded it. The matter which is presently under appeal does not require the preparation of an extensive record. The costs of the appeal should be modest. Despite the fact that the nominal plaintiff is an estate without assets the real beneficiary of any recovery would be the heir of the decedent, his son, Charles Albright, who is the plaintiff here, acting in a representative capacity. No information has been provided as to the financial ability of the real beneficiary of any recovery for the plaintiff in this lawsuit. See 6 Moore's Federal Practice ¶54.74, p. 1505, n. 34, and cases cited.

Memorandum Order on Motion for Leave to Appeal in Forma Pauperis—Civil Actions Nos. 74-607 and 74-608

Furthermore the court from long acquaintance with this action, and by reason of a prior determination in a preceding related case that the plaintiff could present no provable damages in support of his cause of action, now feels that any further appeal is solely a matter of academic interest to the plaintiff's counsel and, therefore, should not be financed at the public cost.

For the foregoing reasons the motion for leave to appeal *in forma pauperis* in each of the above actions is hereby DENIED.

ORDERED filed this 25th day of March, 1975.

GERALD J. WEBER,
United States District Judge.

cc:

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